

No. 7170

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JOSE MAYOLA,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLEE'S PETITION FOR REHEARING.

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United States Attorney,

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*Attorneys for Appellee.*

**FILED**

JUN 28 1934



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## APPELLEE'S PETITION FOR REHEARING.

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*To the Honorable Curtis D. Wilbur, Presiding Judge,  
the Honorable William H. Sawtelle and Francis  
A. Garrecht, Associate Judges, of the Circuit  
Court of Appeals for the Ninth Circuit:*

Appellee respectfully petitions for rehearing upon the following grounds:

### I.

That portion of the Court's opinion which states:

“The law is plain—the declarations of co-conspirators must be made in furtherance of the object of the conspiracy in order to come within the *res gestae* rule”,

is, we respectfully submit, an incorrect statement of the law.

## II.

The correct rule established in this Circuit following the decisions of the United States Supreme Court is:

“The declarations must be made in furtherance of a common object, or must constitute a part of the *res gestae* of acts done in such furtherance.”

## III.

The declarations considered by the Court in the instant case, viewed in light of the correct rule, were properly admitted in evidence.

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 I.

THAT PORTION OF THE COURT'S OPINION WHICH STATES:  
 “THE LAW IS PLAIN—THE DECLARATIONS OF CO-CONSPIRATORS MUST BE MADE IN FURTHERANCE OF THE OBJECT OF THE CONSPIRACY IN ORDER TO COME WITHIN THE RES GESTAE RULE,” IS AN INCORRECT STATEMENT OF THE LAW.

The Court's statement of the rule assumes that, to be admissible as *res gestae* of the conspiracy, declarations must be in furtherance of the object of the conspiracy. If this were a correct statement of the law, such declarations would be admissible without reference to whether they were or were not *res gestae* of the conspiracy.

We have examined the authorities cited by the Court and have failed to find in any of them, except

in *Romeo v. U. S.*, 23 F. (2d) 551, any discussion of the *res gestae* rule.

With reference to the *Romeo* case, we respectfully submit that the Court is in error in assuming from the concurring opinion therein that the rule of *Jones v. U. S.*, 179 Fed. 584, 601, has not been adhered to in this Circuit. The Court, in the *Romeo* case, did not refuse to adhere to the rule of the *Jones* case but expressly stated that the declarations under consideration in the *Romeo* case were not *res gestae* of the conspiracy. We respectfully contend that the Court in this portion of its opinion did not fully consider the distinction between declarations of conspirators admissible because made in furtherance of the conspiracy, and declarations not necessarily in furtherance of the conspiracy but admissible as *res gestae*.

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## II.

THE CORRECT RULE ESTABLISHED IN THIS CIRCUIT FOLLOWING THE DECISIONS OF THE UNITED STATES SUPREME COURT IS: "THE DECLARATIONS MUST BE MADE IN FURTHERANCE OF A COMMON OBJECT, OR MUST CONSTITUTE A PART OF THE RES GESTAE OF ACTS DONE IN SUCH FURTHERANCE".

We respectfully urge that the rule followed in the *Jones* case, *supra*, is the correct rule and that declarations of conspirators which are not in furtherance of the conspiracy are admissible if they constitute a part of the *res gestae* of acts done in furtherance of the

conspiracy. The following cases are authority for the correctness of this contention:

- U. S. v. Gooding*, 12 Wheat. 460, 469;  
*American Fur Co. v. U. S.*, 2 Peters 358, 364;  
*Nudd v. Barrows*, 91 U. S. 426, 438;  
*St. Clair v. U. S.*, 154 U. S. 134, 149;  
*Wiborg v. U. S.*, 153 U. S. 632, 657;  
*Underhill Criminal*, 3d Ed., p. 957, §718, states the same rule, together with authorities there cited.

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### III.

THE DECLARATIONS CONSIDERED BY THE COURT IN THE INSTANT CASE, VIEWED IN LIGHT OF THE CORRECT RULE, WERE PROPERLY ADMITTED IN EVIDENCE.

As to the applicability of the rule to the declarations under consideration in the instant case, we respectfully refer the Court to appellee's brief herein, subdivision III, pages 13 to 16 inclusive. In this connection we again urge upon the Court that these declarations were all made during the existence of the conspiracy; that all the declarations related to acts done in the furtherance of the conspiracy, and that in so far as they were narrative of past events, those past events were all acts done in furtherance of the conspiracy, and the declarations relative to them were in the nature of report from one conspirator to another of the progress of the conspiracy, not a narration of things done during the conspiracy after the conspiracy had terminated.



It is respectfully submitted that under the authority of the cases cited the declarations in question were properly admitted.

H. H. MCPHKE,  
United States Attorney,

W. E. LICKING,  
Asst. United States Attorney,  
*Attorneys for Appellee.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled case, and that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated: San Francisco, California,  
June 28, 1934.

H. H. McPIKE,  
United States Attorney,  
*Of Counsel for Appelle and  
Petitioner.*